

BRB No. 06-0919 BLA

NORMA D. ROBERTSON)	
(Widow of JAMES K. ROBERTSON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BERRY MOUNTAIN MINING)	DATE ISSUED: 07/24/2007
COMPANY, INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Lance O. Yeager (Ferreri & Fogle), Louisville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (2006-BLA-5056) of Administrative Law Judge Ralph A. Romano on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge found that the

¹ Claimant is the surviving spouse of a miner, who died on January 12, 2004. The death certificate lists the immediate cause of death as bilateral pneumonia. Carcinoma of the lung and "black lung" are listed as contributing causes to the miner's death. The

evidence of record established that the miner had a coal mine employment history of ten and one-half years, that he suffered from pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer contends that the administrative law judge should have accorded greater weight to the better reasoned opinions of Drs. Selby and Caffrey, that the miner's death was not hastened by pneumoconiosis, over the contrary opinions of Drs. Carcelen and Wilson. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R.

miner was receiving benefits at the time of his death pursuant to a claim he filed during his lifetime. *Robertson v. Berry Mountain Mining Co.*, BRB No 00-0970 BLA (July 21, 2001) (unpub.). Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim, however. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as his findings regarding the existence of pneumoconiosis arising out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).³

In the instant case, the evidence relevant to the cause of the miner's death includes the miner's death certificate signed by Dr. Wilson, listing bilateral pneumonia due to lung cancer and black lung, as the cause of death. Director's Exhibit 5. The evidence also includes a medical opinion by Dr. Wilson, stating that pneumoconiosis hastened the miner's death by shortening his oxygen reserve. Claimant's Exhibit 1. Dr. Carcelen, the miner's treating physician, stated that he first saw the miner in August of 2002 and that the miner's chronic respiratory conditions, related to coal mine dust inhalation, contributed to and hastened his death. Dr. Carcelen explained that the miner probably developed a recurrence of pneumonia, at least, in part, because of his impaired immune response, and that his limited pulmonary reserve undoubtedly hastened his death. Director's Exhibit 9.⁴ Dr. Selby, based on his review of the medical evidence of record, opined that the miner suffered from emphysema due exclusively to cigarette smoking and lung cancer, did not suffer from any coal mine dust related disease, and that coal dust exposure played no role in the miner's death. Dr. Selby opined that the miner did not have clinical pneumoconiosis and that it was not the cause of death. Dr. Selby further opined that even if the miner were found to have had pathologic evidence of pneumoconiosis, as diagnosed on the pathology report, such a finding would not translate to show that pneumoconiosis caused the miner's death.⁵ Director's Exhibit 12. Lastly, Dr. Caffrey stated that while the miner had a very minimal degree of coal workers' pneumoconiosis as diagnosed in the pathology report, he had neither clinical nor legal pneumoconiosis, and pneumoconiosis played no role in the miner's death. Director's

³ Because the miner last worked in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 12.

⁴ In a report dated November 1, 2004, Dr. Carcelen noted that when he first saw the miner in August of 2006, the miner had a severe impairment in lung function, had undergone surgical resection for two separate lung cancers, and had pathologically proven coal workers' pneumoconiosis as described in a resected lung specimen. Dr. Carcelen further noted that the miner developed metastatic disease and was hospitalized with pneumonia and sepsis in December 2003. Dr. Carcelen noted that the miner died in January of 2004. Director's Exhibit 9.

⁵ The record contains a surgical pathology report as a result of a right lower lobectomy performed on May 29, 1998. In addition to a diagnosis of cancer, a diagnosis of simple coal workers' pneumoconiosis is listed in the report. Director's Exhibit 13.

Exhibit 11. Dr. Caffrey opined that the miner's pulmonary problems and resulting death were related to his years of smoking.

In considering this evidence, the administrative law judge noted that Dr. Carcelen was the miner's treating physician and that his opinion was based on his treatment of the miner. The administrative law judge further noted that Dr. Carcelen's opinion was supported by the opinion of Dr. Wilson, who had also treated the miner during his lifetime and had completed the death certificate, which listed pneumoconiosis as one of the causes of the miner's death. The administrative law judge rationally found the opinions of Drs. Selby and Caffrey less persuasive as to the cause of the miner's death, because Dr. Selby found no pneumoconiosis, the existence of which the administrative law judge found and employer conceded, and because Dr. Selby did not accept the fact that pneumoconiosis is a latent and progressive disease, contrary to the regulations.⁶ Similarly, the administrative law judge found Dr. Caffrey's opinion unpersuasive and equivocal, at best, because Dr. Caffrey found simple coal workers' pneumoconiosis on the pathology slides, but then stated that the miner didn't have clinical pneumoconiosis.

Employer first contends that the administrative law judge erred in according less weight to the medical opinion of Dr. Selby, that the miner's death was not related to coal mine employment or pneumoconiosis, for the reason that the doctor did not find that the miner suffered from coal workers' pneumoconiosis. Employer argues that Dr. Selby's diagnosis of no pneumoconiosis was "perfectly reasonable" based on the miner's twenty-three negative chest x-ray interpretations from 1994 to 2003, and the fact that Dr. Selby had left open the possibility that pneumoconiosis could be found pathologically. We reject employer's assertion, however, and hold that the administrative law judge rationally found that Dr. Selby's opinion on the miner's cause of death was entitled to little weight as the physician opined that the miner did not suffer from pneumoconiosis, a diagnosis contrary to the administrative law judge's determination and employer's concession that the miner had pneumoconiosis. Decision and Order at 9; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see generally Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70 (4th Cir. 1995).

Employer also contends that it was irrational for the administrative law judge to accord little weight to the opinion of Dr. Caffrey, the pathologist, on the basis that the

⁶ Pneumoconiosis is recognized as a latent and progressive disease. 20 C.F.R. §718.201(c).

The administrative law judge noted that Dr. Selby asserted that the miner's pneumoconiosis would not progress beyond a few months after the miner's retirement. Director's Exhibit 12.

physician failed to diagnose pneumoconiosis. Employer contends that Dr. Caffrey rationally explained how he could not make a diagnosis of either clinical or legal pneumoconiosis and concluded that the miner's death was due to smoking because only a very minimal amount of pneumoconiosis was diagnosed on the miner's pathology report, while there were a great number of negative x-rays taken during the miner's lifetime and the miner had an extensive smoking history. Contrary to employer's contention, the administrative law judge could permissibly find that Dr. Caffrey's opinion unpersuasive and, at best, equivocal, because the doctor acknowledged that pneumoconiosis was diagnosed on the pathology report, then stated that there was no clinical or legal pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Employer argues that the administrative law judge erred in according superior weight to the opinions of Drs. Carcelen and Wilson, treating physicians, who opined that the miner's death was due to pneumoconiosis, as neither physician noted the significance of the miner's coal workers' pneumoconiosis while the miner was alive.⁷ Employer contends, therefore, that neither physician's opinion was as well-reasoned on the issue of death due to pneumoconiosis, as the opinions of Drs. Selby and Caffrey. Employer further avers that, notwithstanding their status as the miner's treating physicians, neither Dr. Carcelen nor Dr. Wilson possessed the "merits and credentials" of Drs. Selby and Caffrey, and their opinions should not, therefore, have been accorded additional weight. Employer's Brief at p.14 (unpaginated).

In according greater weight to the opinion of Dr. Carcelen, the administrative law judge found that Dr. Carcelen provided a well-reasoned and well-documented opinion as to why coal mine dust exposure was a significant contributor to the miner's death because it hastened the miner's death. The administrative law judge found that Dr. Carcelen's opinion, that while the miner's death was due to bilateral pneumonia, his pneumonia was hastened by his limited pulmonary reserve which was due to pneumoconiosis and emphysema, Director's Exhibit 9, satisfied the regulatory definition that pneumoconiosis is a substantially contributing cause of death if it "hastens" death pursuant to Section 718.205(c)(5). *See Bradberry*, 117 F.3d at 1367, 21 BLR at 2-176.

In addition, the administrative law judge rationally found that Dr. Wilson's conclusion that "[p]neumoconiosis hastened [the miner's] death by shortening his oxygen reserve" and that "[w]ithout his reserve he could not fight off" pneumonia, Claimant's Exhibit 1, buttressed Dr. Carcelen's conclusions and was sufficient to support a finding

⁷ Contrary to employer's contention, the record shows a diagnosis of pneumoconiosis in the miner's treatment records. Director's Exhibits 8, 9.

that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). See *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-176.

Citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), employer argues that the Sixth Circuit court stated that the mere fact that pneumoconiosis made a miner weaker and less resistant to other trauma was insufficient to establish that the pneumoconiosis "hastened" death. Instead, the Sixth Circuit court held that pneumoconiosis only "hastens" death when it does so through a specifically defined process that reduces the miner's life by an estimable time. We note, however, that *Williams* is not controlling law in the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. In *Bradberry*, the Eleventh Circuit court held that a doctor's opinion that a miner with the degree of lung problems the miner had, may have had a greater chance of surviving, if he had not had pneumoconiosis. The court held that such evidence could show that the miner's death was hastened by pneumoconiosis. Accordingly, we reject employer's argument and hold that the administrative law judge rationally found that the opinions of Drs. Carcelen and Wilson established that pneumoconiosis "hastened" the miner's death.

We also reject employer's contention that the administrative law judge was required to accord superior weight to the opinions of Drs. Selby and Caffrey, based on their superior credentials.⁸ A physician's qualifications are only one of many qualitative factors that the administrative law judge should take into account when determining the weight to be accorded a physician's opinion. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In view of the administrative law judge's rational determination that the opinion of Dr. Carcelen, as supported by the medical conclusions of Dr. Wilson, was entitled to the greater weight as better-reasoned than the opinions of Drs. Selby and Caffrey, we reject employer's assertion and affirm the administrative law judge's decision to accord greater weight to the opinions of Drs. Carcelen and Wilson. Moreover, we note that Dr. Carcelen, like Dr. Selby, is Board-certified in internal medicine and pulmonary disease. We, thus, affirm the administrative law judge's determination that pneumoconiosis was a substantially contributing cause of the miner's death as it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-176.

⁸ The administrative law judge noted the doctors' credentials. Dr. Selby is Board-certified in internal medicine and pulmonary disease. Dr. Caffrey is Board-certified in anatomic and clinical pathology. Dr. Carcelen is Board-certified in internal medicine, pulmonary disease and critical care medicine. Dr. Wilson is Board-certified in family practice and geriatric medicine.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge